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Capital v. Labor: Who Wins and Who Loses Under the Immigration Act of 1990?

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COMMENT

CAPITAL v. LABOR: WHO WINS AND WHO LOSES UNDER THE IMMIGRATION ACT OF 1990?

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Human labor, whether directly exercised or stored in such products as tools, machinery, or domesticated animals, represents the sole resource of humanity in confronting nature. Thus for humans in society, labor power is a special category, separate and inexchangeable with any other, *simply because it is human*.¹

I. INTRODUCTION

The Immigration Act of 1990² (IA90), effective from the first day of the federal fiscal year 1992,³ amends the basic law of the Immigration and Nationality Act⁴ (INA). The changes in immigration law relate mainly to numerical limits and the preference system for the disbursement of permanent resident visas.⁵ The limit for total worldwide immigration visas has increased from 540,000 to 700,000,⁶ with 465,000 available for family-sponsored immigrants,⁷ 140,000 available for employment-based immigrants,⁸ 55,000 available for spouses and children of newly legalized aliens,⁹ and 40,000 available for special diversity transition programs.¹⁰ While the number of employment-based visas has increased with

1. HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 51 (1974).

2. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

3. IA90 § 161(a).

4. Pub. L. No. 820-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557) (1988)).

5. See 67 INTERPRETER RELEASES 1354 (Dec. 3, 1990); see also HELEN SKLAR, *THE IMMIGRATION ACT OF 1990 HANDBOOK: THE COMPLETE PRACTICE GUIDE TO THE 1990 ACT* § 1, at 1 (1991).

6. IA90 § 101(a) (amending INA § 201, 8 U.S.C. § 1151). The 700,000 cap is for fiscal years 1992-94. The number decreases to 675,000 annually thereafter. *Id.*

7. IA90 § 101(a) (adding INA § 201(c)).

8. IA90 § 101(a) (adding INA § 201(d)).

9. IA90 § 101(a) (adding INA § 201(e)).

10. IA90 § 132. To qualify under the diversity immigrant program, the alien must be a native of a foreign state (not contiguous to the United States) which is listed as "adversely affected." *Id.* Applicants are chosen on a first come, first serve basis. *Id.* Although thirty-four states qualify as "adversely affected," this provision, also dubbed "the Lottery," will mainly benefit the Irish because it reserves at least 16,000 spots for them. Mary Benanti, *How Immigration Lottery Works*, GANNETT NEWS SERV., Oct. 14, 1991, available in LEXIS, Nexis Library, GNS File.

the enactment of the IA90, the law has effectively denied immigration visas to unskilled workers.¹¹

The liberalization of trade between markets and market areas over the last fifteen years is a trend likely to continue,¹² and the integration of the world economy of the 1980s will intensify during the 1990s.¹³ Multi-national agreements and trade acts remove barriers that previously prevented the free movement of factors of production¹⁴ across national borders.¹⁵ However, while those in control of production capital¹⁶ have historically reaped the profits from market integration, there is no indication that labor has gained a share of these profits.¹⁷

The increased mobility of capital, whether in the form of products, production capacity, or assets, empowers its owners in relation to labor and the individual governments within a trade bloc.¹⁸ As capital becomes increasingly mobile, with no concurrent increase in labor mobility, employers in control of capital will have more power to dictate, rather than negotiate, working conditions and wage rates.¹⁹ Owners of production capacity can threaten to

11. See Alice E. M. Aragonés, *The Immigration Act of 1990: Changes in Employment-Based Immigration*, 5 GEO. IMMIGR. L.J. 109, 113 (1991).

12. The European Economic Community (EEC) is the best known example of a regional bloc or transnational trading area that resulted from facilitated trade. Currently, North America and the Pacific Rim are similarly emerging. See RICHARD EDWARDS & PABLO GARONNA, *THE FORGOTTEN LINK: LABOR'S STAKE IN INTERNATIONAL ECONOMIC COOPERATION* 1 (1991).

13. *Id.*

14. By factors of production, we refer to raw materials, finished products, services, and labor.

15. Richard Peet, *Part II: Introduction*, in *INTERNATIONAL CAPITALISM AND INDUSTRIAL RESTRUCTURING* 35, 36 (Richard Peet ed., 1987). "As the different national production systems have entered into greater competition, and as multinational corporations have gained greater locational freedom, the different capital-labor relations have exercised their determining influence on the geography of industry." *Id.*

16. Capital refers to goods, money, property, and resources.

17. See EDWARDS & GARONNA, *supra* note 12, at 1.

18. As one commentator noted:

The mobility of capital represents bargaining potential. Capital's demands on public policy receive ever more positive consideration from local states. Putting this another way: the global submode of capitalism entails an increase in the strategic power of capital as against labor which is revealed in public policy.

Robert J. S. Ross, *Facing Leviathan: Public Policy and Global Capitalism*, in *INTERNATIONAL CAPITALISM AND INDUSTRIAL RESTRUCTURING* 248, 250 (Richard Peet ed., 1987) (citation omitted).

19. See Richard Peet, *The Geography of Class Struggle and the Relocation of United States Manufacturing Industry*, in *INTERNATIONAL CAPITALISM AND INDUSTRIAL RESTRUCTURING* 40, 42 (Richard Peet ed., 1987). Under capitalism, "[c]hange takes place under coercion rather than through social planning. The structure of space is made by private, profit mak-

relocate in order to win concessions from labor.²⁰ Because most market liberalization programs are primarily concerned with the movement of capital, labor cannot use the same threat of relocation to win concessions from the owners of production capacity.²¹

Stagnant labor pools in underdeveloped countries provide capitalists with an exploitable, powerless, and continuous source of labor.²² If government programs encouraged labor mobility, however, workers could move to where the demand for labor exceeds the supply. The free movement of labor would suppress the potential for exploitation of workers by the owners of capital.

This Comment argues that the IA90 fosters the free movement of capital across national boundaries without doing the same for labor and has the effect of increasing capital's ability to have an exploitative relationship with laborers from the United States and developing countries. Section II focuses on the North American Free Trade Agreement (NAFTA), an international pact committed to increasing capital mobility. It demonstrates the way in which the IA90's increased restriction of labor mobility, combined with increased capital mobility under NAFTA, exacerbates the disparity in empowerment between capital and labor. Section III details the changes in immigration law under the IA90 and examines the intent of Congress in implementing those changes. Section IV analyzes the third employment-based visa provision of the Act pertaining to skilled and unskilled workers, and Section V analyzes

ing decisions rather than by social agreement." *Id.*

20. Richard Peet, *Industrial Restructuring and the Crisis of International Capitalism*, in *INTERNATIONAL CAPITALISM AND INDUSTRIAL RESTRUCTURING* 9, 18 (Richard Peet ed., 1987).

[A] fringe of less developed regions is also available offering various combinations of lower conflict and/or lower wages. The potential exists for considerable advantage to be gained by corporations relocating to, or purchasing from, the various peripheries of the capitalist world system.

Id. See MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* 288 (1984).

21. Bluestone and Harrison present evidence showing that layoffs and plant closings actually improve conditions for management because people fear losing their livelihood. Workers are more willing to accept any demands made by management, including lower wages, just to save their jobs. Barry Bluestone & Bennett Harrison, *The Impact of Private Disinvestment on Workers and Their Communities*, in *INTERNATIONAL CAPITALISM AND INDUSTRIAL RESTRUCTURING* 72, 97-98 (Richard Peet ed., 1987). However, concession bargaining often fails. Concessions in the auto industry during the late 1970s and early 1980s did not save jobs. MIKE PARKER & JANE SLAUGHTER, *CHOOSING SIDES: UNIONS AND THE TEAM CONCEPT* 42 (1988). "Concessions had no effect on the factors that determine the number of auto jobs in the U.S. . . ." *Id.*

22. Peet, *supra* note 19, at 59. Unemployed and underemployed people in the developing countries "provide[] an unending stream of cheap labor for transnational industry, a condition which renders worker unionization extremely difficult." *Id.*

the fifth employment-based visa provision concerning capital investors. Sections IV and V, in combination, illustrate how U.S. immigration policy restricts the international movement of labor, while easing the movement of capital. The result is an increased potential for the exploitation of labor and an enhanced inequality between capital and labor in the current marketplace. Section VI explains the importance of granting labor greater freedom of mobility and proposes a modification of current immigration laws to realize these benefits. This Comment concludes that the interaction of the IA90's immigration policies with capital-oriented free-trade agreements, such as NAFTA, will ultimately contribute to a decline in the economic and social order in the United States.

II. THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

A. *History and Background of NAFTA*

In June of 1990, Mexican President Carlos Salinas de Gortari, wanting to participate in the global movement into regional blocs,²³ first requested a free trade agreement,²⁴ and the idea has since rapidly gained momentum.²⁵ President Bush, on September 25, 1990, formally notified Congress that he wished to enter free trade negotiations with Mexico,²⁶ and on February 5, 1991, the governments of Canada, the United States, and Mexico announced their intentions to begin NAFTA negotiations.²⁷ On May 24, 1991, Congress extended the "fast-track" procedures for NAFTA.²⁸ On

23. M. Delal Baer, *North American Free Trade*, FOREIGN AFF., Fall 1991, at 132.

24. Economists and area specialists have discussed the notion of a North American free trade agreement for more than forty years. Ted Van Dyk, *Montezuma's Revenge*, FIN. WORLD, July 23, 1991, at 68.

25. Baer, *supra* note 23, at 132.

26. Andrew Lowry, *Market is Large, Growing, Especially for U.S. Goods: MexicoWorld Trade Outlook 1991*, BUS. AM., April 22, 1991, at 10.

27. *First Public NAFTA Hearings Open With San Diego Session*, LDC Debt Rep./Latin American Markets (AM. BANKER) No. 31, (Sept. 2, 1991). See Baer, *supra* note 23, at 132. Canada and the U.S. already have CAFTA, a Canada-U.S. free trade agreement that came into effect on January 1, 1989. *Id.* at 140.

28. *Advancing the Enterprise for the Americas Initiative: A Year of Accomplishments*, FED. NEWS SERV., June 27, 1991, available in LEXIS, FEDCOM Library, FEDNEWS File. [hereinafter *Advancing the Enterprise*]. The fast-track authority allows the executive administration to present Congress with an agreement as an overall package, subject to a vote with no amendments or omissions permitted. See Van Dyk, *supra* note 24, at 68; see also *Agreement on NAFTA May Be Reached This Year, Commerce Official Says*, Daily Rep. for Execs. (BNA) No.18, at A-8 (Jan. 28, 1992) [hereinafter *Agreement on NAFTA*]; Rudy Sandoval, *Mexico's Path Towards the Free Trade Agreement with the U.S.*, 23 U. MIAMI IN-

June 12, 1991, the participants held the first substantive meeting in Toronto.²⁹ The anticipated signing of NAFTA will allow the U.S. entry into Mexico's market, an area which had been virtually closed.³⁰

If ratified, NAFTA will create the world's largest free trade area.³¹ The North American market would have 370 million people and a gross product of \$6.6 trillion, compared to the 330 million people and \$6.2 trillion gross output of the European Economic Community (EEC).³² As proposed, the agreement seeks to phase out tariff barriers on most goods and services³³ traded between the three nations for a period of ten years or more.³⁴ Consequently, Mexico could replace Japan as the number one trade partner of the United States.³⁵

Many other nations have also participated in lengthy negotiations concerning the removal of international trade barriers and the enhancement of international economic development.³⁶ Regional economic integration has certain advantages, including economies of scale, efficiencies, specializations, and increased investment flows.³⁷ Additionally, many believe that through economic integration and the free mobility of capital, regional wage differentials will decline.³⁸ For example, as the employment rate

TER-AM. L. REV. 133, 152 & n.12. (1991).

29. Baer, *supra* note 23, at 132.

30. Ruth Gastel, *International Insurance*, INS. INFO. INST., Aug. 1991, available in LEXIS, INSRLW Library, IIRPTS File. Mexico's economy malfunctioned in the 1980s when falling oil prices and mounting debt put its economy on the brink of collapse. Baer, *supra* note 23, at 133. Under Miguel de la Madrid, President from 1982 to 1988, Mexico shifted its exports from oil to manufactured goods. *Id.* Mexico's economy has taken a recent turn upwards, experiencing growth in its markets, and a drop in inflation from the hyperinflationary figures of the 1980s to 30 percent in 1990, and 18.8 percent in 1991. Janet Duncan, *Mexican Stock Market Seen Rising 20 to 30 Percent This Year*, BUS. REP. (REUTERS) Jan. 28, 1992.

31. *BofA Report Discusses Impact of North American Free Trade Agreement on California*, BUS. WIRE, Oct. 7, 1991, available in LEXIS, Nexis Library, BWIRE File. [hereinafter *BofA*].

32. *Id.*

33. Mexico currently refuses to include energy in the deal. See Van Dyk, *supra* note 24, at 68.

34. *BofA*, *supra* note 31.

35. *Latin American Economic News Briefs*, XINHUA GEN. OVERSEAS NEWS SERV., Aug. 20, 1991, available in LEXIS, Nexis Library, XINHUA File.

36. EDWARDS & GARONNA, *supra* note 12, at 15. Examples include the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and the Organization for Economic Cooperation and Development (OECD). *Id.*

37. Baer, *supra* note 23, at 141.

38. Graham L. Reid & Laurence C. Hunter, *Integration & Labor Mobilities*, in INTER-

and real wages increase, a higher standard of living might allow those previously below the poverty line to afford many goods which before were economically out of reach. It might also strengthen labor's bargaining potential with the owners of capital.³⁹ However, in order for regional integration to find success on a global scale, the free movement of labor must eventually accompany it.

Of the nations who have taken part in international trade negotiations, only the EEC nations have included a liberated flow of labor in their plans.⁴⁰ Management's high, if not exclusive, level of control in most nations, has caused employers to view employees as merely inputs to the production process, rather than at the human level as working persons.⁴¹ The alternative view, not widely recognized, sees labor as "a subject of integration policy,"⁴² where immigration policy provides for unrestricted movement.⁴³ International councils, however, rarely review policies designed to assist workers in the process of market integration.⁴⁴ For example, NAFTA, a regional pact advocating economic integration, is silent on labor.⁴⁵

B. *The Pros and Cons of NAFTA*

Mexico's economic rise is good news for the United States and a free trade agreement. Currently seventy percent of Mexican im-

NATIONAL LABOR 175, 196 (Solomon Barkin et al. eds., 1967). *But see* SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* 94 (1988).

39. "Higher levels of social benefits contribute indirectly to labor's ability to bargain, for the resultant 'social safety net' emboldens workers in their relations with employers." Ross, *supra* note 18, at 252.

40. Richard A. Nenneman, *Today's Europe - And the Europe of 1600*, CHRIS. SCI. MONITOR, Oct. 16, 1991, at 22. By January, 1993, the EEC should have realized complete mobility of the labor force within its twelve member countries. *Id.*

41. Many view labor as "an object for investment, a source of precious capital." EDWARDS & GARONNA, *supra* note 12, at 3. *See* BRAVERMAN, *supra* note 1, at 53. This view is contrary to one which "sees technologies and techniques as social products whose development is conditioned by social relations." Peet, *supra* note 20, at 10. *See also* Daniel R. Fischel, *Labor Markets and Labor Law Compared With Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061 (1984).

42. EDWARDS & GARONNA, *supra* note 12, at 3.

43. Note that a libertarian would argue that immigration policy should include "[p]olitical freedom to migrate in search of liberty and economic freedom to migrate in search of high rewards." Peter H. Schuck, *The Emerging Political Consensus on Immigration Law*, 5 GEO. IMMIGR. L.J. 1, 3 (1991).

44. EDWARDS & GARONNA, *supra* note 12, at 3, 15-16. *See infra* notes 60-62 and accompanying text.

45. *See infra* notes 60-61 and accompanying text.

ports come from the United States,⁴⁶ and a better Mexican economy means more U.S. exports because Mexico spends fifteen percent of any increase in income on U.S. goods.⁴⁷ Every one billion dollars worth of additional exports from the United States translates into 20,000 new jobs for Americans.⁴⁸ In his fourth State of the Union Address, President Bush predicted that NAFTA will create 320,000 jobs through trade with Canada and Mexico.⁴⁹ Proponents of NAFTA argue that investments in manufactured goods for the North American market will increase employment opportunities inside Mexico, thus making emigration a less appealing option.⁵⁰ Additionally, many feel that the reduction in wage differentials will permit Mexicans to find work within Mexican communities, rather than having to migrate northward.⁵¹

This view is contrasted by one which sees capital mobility as enhancing the prospect of labor mobility.⁵² Studies show that large numbers of immigrants come to the United States when their

46. *Agreement on NAFTA*, *supra* note 28, at A-8.

47. *BofA*, *supra* note 31.

48. *Hills Says NAFTA Bracketed Text Will Be Ready by End of January*, Int'l Trade Rep. (BNA) No.5, at 188 (Jan. 29, 1992). See *BofA*, *supra* note 31.

49. *Highlights of Bush's State of the Union*, UPI, Jan. 28, 1992, available in LEXIS, Nexis Library, UPI File. See *State of the Union, Bush Proposes Tax Credits, Spending Freeze, Defense Cuts in Economic Plan*, Daily Rep. for Execs. (BNA) No. 19, at S-2 (Jan. 29, 1992). Representative Bill Archer says that NAFTA will present greater opportunities for jobs and help stem the flow of illegal aliens from Mexico. *Rep. Archer Defends Employment Impact of Proposed North American Trade Pact*, Int'l Trade Daily (BNA) (Sept. 9, 1991) [hereinafter *Rep. Archer*]. Lower cost Mexican labor also permits the creation of high-tech jobs in the U.S. *Id.*

50. *BofA*, *supra* note 31. However, this will not necessarily alleviate Mexican poverty. See Kim Bolan, *Mexicans Sound Alarm on Free-Trade Pact: Poor Lose Out, Activists Claim*, VANCOUVER SUN, Nov. 25, 1991, at B12. "[F]oreign corporations have proven to be the worst employers in Mexico." *Id.* (quoting Regina Castenada, an anti-poverty activist, and Georgina Martinez, a university instructor and union organizer). Some also anticipate a growing *maquiladoras* problem. *Maquiladoras* are the hundreds of export-oriented subsidiaries that U.S. companies have set up in Tijuana and other border cities that look for "cheap and plentiful labor, access to U.S. markets, and relaxed environmental and worker-safety standards." Patrick McDonnell, *Free Trade Promises More Explosive Industrial Growth. But Whether It Will Slow the Flow of U.S.-Bound Immigrants Is Unclear*, L.A. TIMES, Oct. 22, 1991, (World Rep.), at 11.

51. *BofA*, *supra* note 31. Not everyone, however, favors the proposed free trade agreement. See Baer, *supra* note 23, at 142. Some have criticized a free trade zone by arguing that it discriminates against trade and investment by other nations outside the zone. Van Dyk, *supra* note 24, at 68. There is also a debate which pits liberal free trade advocates against protectionists. Baer, *supra* note 23, at 143. The AFL-CIO, for example, has declared "war" on NAFTA because it fears the possibility of low-wage Mexican labor enticing U.S. companies to move locations, which in turn will cause the loss of approximately 500,000 American jobs. *Id.*

52. SAsSEN, *supra* note 38, at 1.

countries of origin have high industrial growth rates and major increases in direct foreign investment.⁵³ In her book *The Mobility of Labor and Capital*,⁵⁴ Saskia Sassen argues that development of off-shore production sectors in developing countries creates cultural and ideological links between the developed countries⁵⁵ and the developing countries where direct foreign investment concentrates.⁵⁶ Sassen attacks the assumption that poverty, overpopulation and a stagnant economy alone cause emigration.⁵⁷ She notes that not all countries with extensive poverty experience emigration, and that emigration from the main sending countries started at a time of relatively high growth rates in employment and domestic product.⁵⁸ She argues that military activities and foreign investment by developed countries in developing countries create links and disrupt "traditional" economies with large scale-development.⁵⁹ This often results in what Sassen terms "linkages" that lead to a growing desire and ability of many workers to emigrate to the more developed countries.

C. Labor Mobility and NAFTA

Although NAFTA may present a positive outlook toward economic growth and trade, it ignores labor's stake.⁶⁰ The free flow of labor does not even appear on the negotiating table.⁶¹ NAFTA

53. *Id.* at 94.

54. *Id.*

55. The desire to emigrate often results from networks of business change. For example, if U.S. businesses set up in Mexico, workers there get a vision of the United States. Some visit the United States and then go back to Mexico and mobilize other Mexicans to move. *See generally id.*

56. SASSEN, *supra* note 38, at 2, 19.

57. *Id.* at 5.

58. *Id.* An example is South Korea, a country with "one of the highest growth rates in [Gross Domestic Product], in general employment, and particularly in manufacturing employment." *Id.* Between 1970 and 1980, South Korean migration to the United States increased by 412%. *Id.* at 13.

59. *Id.* at 6. As an example, Sassen cites events in the Dominican Republic where emigration began in the mid-1960s. *Id.* at 7. "Subsequent to the election victory of Bosch . . . , the U.S. government sent marines to Santo Domingo. This occupation . . . created objective linkages with the U.S. . . . [that] eventually evolved into conditions that facilitated further emigration of Dominicans to the U.S. and . . . the emergence of emigration to the U.S. as an option actually perceived by individuals as available to them." *Id.* at 7-8.

60. "[N]o one is contemplating a European-like common market, featuring virtually unfettered transnational labor mobility." McDonnell, *supra* note 50, at 11. *See Baer, supra* note 23, at 148 (proposing that NAFTA, as currently envisioned, has no resemblance to the EEC, which permits the free movement of labor).

61. *Rep. Archer, supra* note 49, at S-2. On September 5, 1991, Representative Bill

negotiators have apparently ignored the possibility that labor mobility might strengthen regional economic integration.⁶² Ironically, U.S. involvement in NAFTA and North American economic integration may still help pave the road toward future labor mobility. United States investments in developing countries create pools of immigrants by displacing workers,⁶³ introducing new segments into the workforce,⁶⁴ and creating cultural links.⁶⁵ As a result, NAFTA, contrary to the assumptions of many of its proponents, may in fact induce, rather than deter, Mexican migration to the United States.

Nevertheless, workers in developing countries wishing to legally immigrate to the United States will still face obstacles, including the IA90's protectionist immigration policies. Article 13(2) of the Universal Declaration of Human Rights declares that "Everyone has the right to leave any country, including his own, and to return to his country."⁶⁶ But "[w]hat use [is] the human right to leave a country if there is no [similar] human right to enter another?"⁶⁷ Unskilled workers of other nations seeking to immigrate to the United States under the IA90 find the borders closed to all but the few lucky enough to surpass the bureaucracy and waiting lists for immigration described later in this Comment.⁶⁸ Article 23(1) of the Universal Declaration of Human Rights says that, "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against

Archer commented on NAFTA: "This does not mean we are going to open our doors to greater immigration into this country." *Id.* (statement of Rep. Archer).

62. See Michael Richardson, *Asians, Short of Labor, Ease Migration Curbs*, INT'L HERALD TRIB., Oct. 30, 1991, (Finance).

63. See generally SASSEN, *supra* note 38. For example, when foreign investors introduce commercial agriculture into developing nations, independent farmers and small producers in those countries can no longer effectively compete. This forces them to migrate to urban areas to work as wage-laborers. *Id.* at 5, 17-18, 96-97.

64. Foreign plant recruitment programs have introduced large-scale movement of young women into wage-labor, thus disrupting traditional male labor pools. *Id.* at 18. Furthermore, the introduction of modern forms of production causes the "disruption of traditional work structures" by displacing workers, such as farmers and small producers, and causing them to become wage-laborers or to migrate. *Id.*

65. *Id.* at 20-21. When Western plants move to developing countries, workers begin to experience and enjoy certain aspects of Western life. This occurs, for example, when they help manufacture export products and converse with Westerners. *Id.*

66. *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3rd Sess., (1948) [hereinafter *Human Rights*].

67. *Europe's Would-Be Westerners; Hard-Nosed Generosity Towards Immigrants Is Called For*, THE ECONOMIST, August 17, 1991, at 12.

68. See discussion *infra* part IV.B.

unemployment."⁶⁹ The problem is that so long as labor mobility is restricted, many of those born in developing countries will not realize any of these "rights." Capitalist development without labor mobility means "production without purpose, except to stay alive"⁷⁰ Birthplace alone, uncontrollable by the recipient, can determine whether a person enjoys the privileges of the developed countries, or continues to struggle in the developing countries. Notions of justice and fairness dictate that change is necessary.

Even though NAFTA focuses on capital to the exclusion of labor, it has the potential to contribute to a long-term positive impact on the social, economic, and political strength of labor when accompanied by other international policies which increase labor mobility. The IA90 and NAFTA, however, are at odds. Rather than complementing each other, NAFTA creates a "push factor" for the cross-border migration to the United States, while the IA90 maintains border restrictions hindering the perhaps unintended, but nevertheless real, migration incentives created by NAFTA. The result is a proliferation of stagnant labor pools in developing countries.⁷¹ Ultimately, not only will the workers suffer because they are easily exploitable, but so will U.S. workers, who will inevitably lose jobs as businesses move to developing countries.

III. CHANGES IN IMMIGRATION LAW UNDER THE IA90 AND CONGRESS'S UNDERLYING GOALS IN IMPLEMENTING THE ACT

A. *Passage of the IA90*

The IA90 concludes Congress's adoption of recommendations made by the 1981 Report of the Select Commission on Immigration and Refugee Policy, which included proposals for making the U.S. economy more competitive.⁷² Congress approved the bill on

69. *Human Rights*, *supra* note 66.

70. A. Sivanandan, *Imperialism and Disorganic Development in the Silicon Age*, in *INTERNATIONAL CAPITALISM AND INDUSTRIAL RESTRUCTURING* 185, 197 (Richard Peet ed., 1987).

The enforcement of national borders contributes to the existence of a large number of countries in the form of a periphery and the designation of its workers as a labor reserve for global capital. Border enforcement is a mechanism facilitating the extraction of cheap labor by assigning criminal status to a segment of the working class-illegal immigrants.

SASSEN, *supra* note 38, at 36-37.

71. See generally, Peet, *supra* note 19; SASSEN, *supra* note 38.

72. Robert S. Groban, *The Immigration Act of 1990: An Employer's Primer of its New Provisions*, *EMPLOYEE REL. L.J.* 357 (1991).

October 27, 1990.⁷³ Previously, under the INA, aliens could obtain permanent immigration visas under the first, second, fourth, and fifth preferences, related to family relationships,⁷⁴ or under the third and sixth preferences, related to the labor market.⁷⁵ The lower numerical preferences received priority.⁷⁶

The prior third preference category pertained to those with exceptional abilities in the arts and sciences, while the prior sixth preference category gave permanent resident status to skilled and unskilled workers where shortages of employable and willing U.S. citizens existed.⁷⁷ The INA allocated 27,000 visas each, annually, to the third and sixth preference categories, for a total of 54,000 employment-based visas.⁷⁸

The IA90 replaces the INA's third and sixth preferences with five main employment-based preferences.⁷⁹ It increases the total number of visas available to employment-based immigrants from 54,000 to 140,000.⁸⁰ Although this may seem like a dramatic improvement for labor, only visas for the most "desirable" immigrants increased in number, while those for unskilled workers actually decreased.⁸¹

Under the IA90's first employment-based preference, 40,000 visas go to "priority workers," including aliens of extraordinary ability, outstanding professors and researchers, and certain execu-

Congress recognized that existing legislation in this area had not attracted sufficient foreign capital and adopted a totally new approach. This was considered necessary, in part, to compete with countries such as Australia and Canada, which already had successful alien investment programs.

Id. See 136 CONG. REC. S17,112 (daily ed. Oct. 26, 1990) (statement of Sen. Simon).

73. The bill passed on the last day of the 101st Congress. See H.R. CONF. REP. NO. 955, 101st Cong., 2d Sess. 1 (1990), partially reprinted in 1990 U.S.C.C.A.N. 6784; Carol L. Wolchok, *Extensive Revision of Statute Will have Broad Consequences*, NAT'L L.J., May 27, 1991, at 23. Representative Ham Fish noted: "I believe that the conference report continues America's longstanding commitment to immigration." 136 CONG. REC. H12,358 (daily ed. Oct. 27, 1990) (statement of Rep. Fish).

74. 8 U.S.C. § 1153(a)(1)-(2), (4)-(5) (1988).

75. 8 U.S.C. § 1153(a)(3), (6) (1988).

76. Gregory M. Clement, Note, *The New Job-Creating Investor Visa Category: Legitimate Spur to Investment or Sell-Off of U.S. Citizenship to the Highest Bidder?*, 24 GEO. WASH. J. INT'L L. & ECON. 195, 198 (1990).

77. 8 U.S.C. § 1153(a)(3), (6) (1988).

78. *Id.*

79. IA90 § 121(a) (adding INA § 203 (b), 8 U.S.C. § 1153 (b)).

80. IA90 § 101(a) (amending INA § 201, 8 U.S.C. § 1151).

81. IA90 § 121(a) (adding INA § 203(b)(3), 8 U.S.C. § 1153(b)(3)). The number of visas for unskilled workers decreased from 27,000 to 10,000. *Id.* See Scott E. Friedman, *The "Immigration Act of 1990" — A Primer On Green Cards*, 63 N.Y. ST. B.J. 48, 52 (1991).

tives and managers of multinational corporations.⁸² Under the IA90's second employment-based preference, 40,000 visas go to professionals with advanced degrees and aliens of exceptional ability.⁸³ The third employment-based preference provides 40,000 visas for skilled workers, professionals and other workers,⁸⁴ but only 10,000 of these may go to unskilled workers.⁸⁵ Ten thousand visas go to "special immigrants" under the fourth employment-based preference.⁸⁶ Under the fifth employment-based preference, 10,000 visas go to aliens who have \$1 million to invest⁸⁷ in an enterprise which employs no less than ten U.S. workers.⁸⁸ This Comment explores the newly created third and fifth employment-based preferences as a means of analyzing how current U.S. policies on labor, capital, and immigration in general are interrelated and ultimately will affect the stability of domestic and international relations.

B. Congress's Goals — Diversifying the Immigrant Pool and Increasing Skilled Labor Immigration

When discussing the third and fifth employment-related preferences of the IA90, it is helpful to keep in mind Congress's goals of increasing diversity and skilled labor immigration in order to improve the U.S. economy.⁸⁹ Some have argued that allowing a diverse group of people to legally enter and live in the United States "contribute[s] to the betterment of mankind in general."⁹⁰ A con-

82. IA90 § 121(a) (adding INA § 203(b)(1), 8 U.S.C. § 1153(b)(1)).

83. IA90 § 121(a) (adding INA § 203(b)(2), 8 U.S.C. § 1153(b)(2)).

84. IA90 § 121(a) (adding INA § 203(b)(3), 8 U.S.C. § 1153(b)(3)).

85. *Id.*

86. IA90 § 121(a) (adding INA § 203(b)(4), 8 U.S.C. § 1153(b)(4)). The previous "special immigrant" category under INA § 101(a)(27) now includes, among others, ministers and other religious workers, employees at the U.S. consulate in Hong Kong, aliens dependent on a juvenile court, overseas employees of the Panama Canal Company and their families, and retired employees of international organizations and their families. 67 INTERPRETER RELEASES 1211 (Oct. 29, 1990). No more than 5,000 of the 10,000 may go to religious workers. *Id.* "Many of these groups had been included as special immigrants under previous law, but there was no limitation at that time on the number of aliens in that category who could enter." Groban, *supra* note 72, at 361.

87. *See infra* note 188 and accompanying text.

88. IA90 § 121(a) (adding INA § 203(b)(5), 8 U.S.C. § 1153(b)(5)).

89. Senator Alan K. Simpson, who helped sponsor the new law, claimed that the IA90 "open[s] the front door wider to skilled immigrants of a more diverse range of nationalities." 136 CONG. REC. S17,109 (daily ed. Oct. 26, 1990) (statement of Sen. Simpson).

90. Barney Frank, *Legal Immigration Reform: Keynote Address*, 4 GEO. IMMIGR. L.J. 169, 171 (1990). *But see* Julian L. Simon, *Nine Myths About Immigration*, 8 IMMIGR. J. 3, 7

trovercy exists over the extent of diversity within the immigrant pool and the type of policy the government should implement.⁹¹ The employment-related immigrant-visa provisions of the IA90,⁹² which favor an elite type of immigrant,⁹³ show how Congress selectively⁹⁴ implemented its goals of opening the doors and diversifying immigration.⁹⁵

Congress increased the number of skilled immigrant visas issued based on its perception of U.S. needs,⁹⁶ rather than focusing its attention on *why* the United States has a shortage of skilled workers.⁹⁷ The IA90 increases skilled labor immigration and creates a new investor category.⁹⁸ It concurrently almost eliminates unskilled labor immigration to strengthen the U.S. economy and make it more competitive in the global market.⁹⁹ As a result, the unskilled, the semi-skilled, and refugees face greater restrictions when trying to immigrate to the United States than in the past.¹⁰⁰

(July-Sept. 1985). "Also involved are values that may not appeal to all but which are in no way irrational, such as maintaining some degree of cultural or racial homogeneity in the country . . . and keeping a particular political balance." *Id.* (referring to other views of immigration policies and values).

91. "To most economists, the policy problem is to decide which skills we need and then to devise ways to induce workers who possess them to come." Schuck, *supra* note 43, at 3.

92. See *infra* note 185.

93. See Aragonés, *supra* note 11, at 109.

94. "Congress determined that the U.S. would benefit by having more immigrants who come because of their job skills. Thus, while the 1990 Act increases immigrant visas overall, it does so particularly for employment-based visas." STEPHEN YALE-LOEHR, UNDERSTANDING THE IMMIGRATION ACT OF 1990 § 3, at 1 (1991). A determination that the U.S. would benefit by having more skilled immigrants, however, does not necessarily mean that the U.S. would not benefit by having more unskilled immigrants as well.

95. "The new law will make it easier for the South Korean scientist to get a green card and harder for the Mexican housekeeper." Bob Baker, *Winding Through the Maze of Immigration Laws; A Lawyer Helps Foreign Workers Figure It Out. New Rules Go Into Effect Today on Who Can Become a Resident*, L.A. TIMES, Oct. 1, 1991, (World Rep.), at 4.

96. YALE-LOEHR, *supra* note 94, § 3, at 1.

97. See *infra* notes 177-79 and accompanying text.

98. IA90 § 121(a) (adding INA § 203(b)(5), 8 U.S.C. § 1153(b)(5)).

99. See generally Austin T. Fragomen, *Impact of U.S. Immigration Law Based Upon International Business*, 16 CAN.-U.S. L.J. 29, 52 (1990).

100. The number of unskilled workers allowed to immigrate has decreased from 27,000 to 10,000. IA90 § 121(a) (adding INA § 203(b)(3)(B), 8 U.S.C. § 1153(b)(3)(B)).

IV. DOCTRINAL ANALYSIS OF THE IA90'S THIRD EMPLOYMENT-BASED PREFERENCE AND DISCUSSION OF ITS CONSEQUENCES

A. *Third Employment-Based Preference—Skilled Workers, Professionals, and “Others”*

The third employment-based preference¹⁰¹ is a catch-all category that incorporates the previous third and sixth preferences of the INA under one label.¹⁰² It includes skilled workers, professionals,¹⁰³ and “other workers.”¹⁰⁴ Any surplus visas from employment-based preferences one and two¹⁰⁵ spill down and are added to the 40,000 visas already allotted to this third preference category.¹⁰⁶

The IA90 defines skilled workers as those capable of perform-

101. IA90 § 121(a) (adding INA § 203(b)(3), 8 U.S.C. § 1153(b)(3)). The Act states: (3) Skilled Workers, Professionals, and Other Workers. -

(A) In General. - Visas Shall be made available, in a number not to exceed 40,000, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled Workers. - Qualified immigrants who are capable at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other Workers. - Other qualified immigrants who are capable at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on Other Workers. - Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

Id.

102. Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 *FORDHAM INT'L L.J.* 328, 330 (1990-91).

103. IA90 § 121(a) (adding INA § 203(b)(3), 8 U.S.C. § 1153(b)(3)). Contrary to a related provision in the 1990 Act pertaining to advanced degree professionals, “the statutory language for this group does not include educational equivalents based on experience.” Groban, *supra* note 72, at 366. Groban further argues:

As a result, the regulations . . . limit this category exclusively to professionals with an American bachelor's degree or its foreign equivalent. This limitation constitutes a significant departure from previous law construing the third preference categories, but it is unclear whether it will have any practical impact. Most professionals without bachelor's degrees are likely to qualify as skilled workers.

Id.

104. IA90 § 121(a) (adding INA § 203(b)(3), 8 U.S.C. § 1153(b)(3)).

105. IA90 § 121(a) (adding INA § 203(b)(1), 8 U.S.C. § 1153(b)(1)); and IA90 § 121(a) (adding INA § 203(b)(2), 8 U.S.C. § 1153(b)(2)).

106. IA90 § 121(a) (adding INA § 203(b)(3)(A), 8 U.S.C. § 1153(b)(3)(A)).

ing a job requiring at least two years of training or experience.¹⁰⁷ This creates a double requirement — the position offered must be for skilled labor, and the applicant must have the requisite minimum two years of training, experience, or both.¹⁰⁸ If an alien with more than two years experience seeks to fill a position that requires only six months of experience, she would not qualify as a skilled worker under this preference, but would rather qualify as unskilled.¹⁰⁹

Of the 40,000 (and possibly more if there is a spillover) visas allotted to the third preference category, only 10,000 may go to unskilled workers, defined as those capable of performing a job requiring less than two years training.¹¹⁰ A “no spillover” provision in the Act prevents any increase in the number of immigration visas issued to unskilled workers.¹¹¹

Since employment-based petitions under the old law exceeded the annual 54,000 limitation, substantial backlogs in the third and sixth preference categories arose. State Department estimates in January, 1990, showed 126,345 foreigners waiting for former sixth preference visas.¹¹² Of those, sixty percent were skilled and forty percent were unskilled workers.¹¹³

The third IA90 employment-based category now includes the former sixth preference applicants.¹¹⁴ Estimates show that backlogs in the newly created employment-based categories one and two should become current by fiscal year 1992, thus leaving a surplus of visas to spill down to category three.¹¹⁵ Skilled workers and professionals in category three will reap the benefits of the spillover, and the backlogs “may become current or close to current by [fiscal year] 1993.”¹¹⁶ However, as a result of the 10,000 annual visa limit and the “no spillover” provision for unskilled

107. *Id.*

108. Groban, *supra* note 72, at 367.

109. Fragomen, *supra* note 99, at 52. “The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.” 8 C.F.R. § 204.5 (1992).

110. IA90 § 121(a) (adding INA § 203(b)(3)(A), 8 U.S.C. § 1153(b)(3)(A)).

111. IA90 § 121(a) (adding INA § 203(b)(3)(B), 8 U.S.C. § 1153(b)(3)(B)).

112. See 66 INTERPRETER RELEASES 1010 (Sept. 11, 1989).

113. *Id.*

114. See *supra* note 102 and accompanying text.

115. YALE-LOEHR, *supra* note 94, § 3, at 10.

116. *Id.*

workers,¹¹⁷ one consequence for those classified as unskilled will be more backlogs and even longer waiting lists.¹¹⁸ The reduction in the number of visas for unskilled workers, "a class of aliens already experiencing long waiting periods, blatantly reflects Congress's desire for only skilled immigrants"¹¹⁹ and its ignorance of both the problem of education in the United States,¹²⁰ as well as the importance of unskilled workers in the U.S. economy.¹²¹

B. Labor Certification for Third Preference Immigrants

In restructuring employment-based immigration, Congress left the old labor certification provisions largely intact.¹²² Thus, workers seeking to enter the United States under the third employment-based preference must still obtain employer sponsorship and labor certifications.¹²³ The burden remains on the employer to show that the immigrant will neither displace a U.S. worker nor adversely affect her wages or working conditions.¹²⁴ The three areas of change in the labor certification process involve: 1) the creation of a new pilot program;¹²⁵ 2) the requirement of job offer no-

117. IA90 § 121(a) (adding INA § 203(b)(3)(B), 8 U.S.C. § 1153(b)(3)(B)).

118. See 67 INTERPRETER RELEASES 1473 (Dec. 21, 1990); see also SKLAR, *supra* note 5, § 1, at 7, § 3, at 2. At the time of passage of the IA90 there was a two year backlog for people applying for third preference classification under the INA. There was a four year backlog for people applying for sixth preference (unskilled worker) classification under the INA. YALE-LOEHR, *supra* note 94, § 3, at 1.

119. Aragonés, *supra* note 11, at 118. "The law sends 140,000 skilled workers . . . to the head of the line, by-passing the approximately 2.4 million applicants - mostly Hispanic and Asian - on the Immigration and Naturalization Service's (INS) waiting list." *Id.* at 109.

120. See *infra* notes 177-79 and accompanying text.

121. See *infra* notes 168 & 234-35 and accompanying text.

122. See Aragonés, *supra* note 11, at 120; YALE-LOEHR, *supra* note 94, § 3, at 9. Groban summarizes the process for labor certification under INA § 212(a)(14):

[A]pplicants first had to secure a certification from the U.S. Dept. of Labor that domestic workers were not available to fill prospective positions. Typically, this "labor certification" process involved lengthy applications that could only be approved if advertisements in local labor markets failed to attract qualified employees. Certain occupations however, did not have to be approved because they appeared on a separate Labor Dept. schedule (Schedule A) that reflected chronic labor shortages for these positions.

Groban, *supra* note 72, at 359.

123. IA90 § 121(a) (adding INA § 203(b)(3)(C), 8 U.S.C. § 1153 (b)(3)(C)); IA90 § 162(b) (amending INA § 204(a)(1), 8 U.S.C. § 1153(a)(1)).

124. INA § 212(a)(5)(A). See IMMIGRATION: PROCESS AND POLICY 177-78 (Thomas Alexander Aleinikoff & David A. Martin eds., 2d ed. 1991).

125. IA90 § 122(a) (8 U.S.C. § 1182(a)). The Act describes the new Pilot Program as: Labor Market Information Pilot Program for Employment-Based Immigrants. -

(1) The Secretary of Labor shall establish a pilot program which provides for a

tices;¹²⁶ and 3) the granting of parties' rights to submit evidence relating to the application for labor certification.¹²⁷

1. The Pilot Program

The IA90 creates a new pilot program, called the Labor Market Information Pilot Program for Employment-Based Immigrants, which requires the Department of Labor (DOL) in fiscal years 1992-94 to determine if a labor shortage or surplus exists in up to ten occupational classifications in the United States.¹²⁸ The

determination, in accordance with section 553 of title 5, United States Code, of labor shortages or surpluses in up to 10 defined occupational classifications in the United States. In making such determinations, the Secretary shall consider certifications approved under section 212(a)(5)(A) of the Immigration and Nationality Act and labor market and other information.

(2)(A) If under the pilot program there is a determination that there is a labor shortage with respect to an occupational classification, a certification under section 212(a)(5)(A) of the Immigration and Nationality Act for petitions for that occupational classification shall be deemed to have been issued.

(B) If under the pilot program there is a determination that there is a labor surplus with respect to an occupational classification, the Secretary of Labor may nonetheless make a certification under section 212(a)(5)(A) of the Immigration and Nationality Act with regard to a specific job opportunity in the occupational classification if the employer submits evidence, based on extensive recruitment efforts (including such efforts as the Secretary may require), demonstrating that the employer meets all the requirements for certification under such section.

(3) The pilot program under this subsection shall only be effective for applications for certifications filed during the 3-fiscal-year period beginning with fiscal year 1992.

Id.

126. IA90 § 122(a) (8 U.S.C. § 1182(a)). The Act describes the Notice Requirement:

(b) Notice in Labor Certifications. - The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that -

(1) no certification may be made unless the applicant for certification has, at the time of filing the application, provided notice of the filing (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations

Id.

127. IA90 § 122(a) (8 U.S.C. § 1182(a)). The Act explains the right to submit documentary evidence:

(2) [A]ny person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working condition, and information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers).

Id.

128. IA90 § 122(a)(1).

purpose of the new program is efficiency. The Secretary of Labor may consider approved labor certifications and labor market data in making determinations.¹²⁹ What makes the labor certification process different under the IA90 is that now the DOL recruits American workers at the national level, rather than testing individual job openings at the regional or local level.¹³⁰ Thus, for example, if a U.S. worker in California can fill the type of position requested by an employer in New York, no shortage exists, even if no U.S. worker in New York is able and willing to fill that position.¹³¹

Under the new pilot program, the DOL determines the ten occupational classifications.¹³² If the Secretary finds a shortage, the DOL will automatically grant the certifications, thus making the process "similar to the DOL's current Schedule A, Group I regulations, which grant blanket labor certification to physical therapists and professional nurses, for example, because they are in short supply."¹³³ To qualify under the pilot program, employers must submit petitions accompanied by documentation establishing that the alien qualifies for one of the shortage occupations.¹³⁴ If the local employment office accepts the application, the employer can then begin to recruit U.S. workers.¹³⁵

Perhaps the new pilot program will make labor certification more efficient. Nonetheless, many have found the new process not

129. See YALE-LOEHR, *supra* note 94, § 3, at 9.

130. INA § 212(a)(5). See Stephen Yale-Loehr, *Panel III: Labor Market Aspects of Legal Immigration Reform*, 4 GEO. IMMIGR. L.J. 249, 250 (1990).

131. Lynda S. Zengerle, *Panel III: Labor Market Aspects of Legal Immigration Reform*, 4 GEO. IMMIGR. L.J. 249, 256 (1990).

132. University of Michigan professor Malcolm S. Cohen has analyzed the current labor market and projects that the following occupations (all requiring at least two years training) may have labor shortages: physical therapists, registered nurses, veterinarians, electrical and electronic engineers, computer systems analysts, doctors, dieticians, pharmacists, chemical engineers, biological and life scientists, dentists, counselors, and legal assistants. YALE-LOEHR, *supra* note 94, § 3, at 9.

133. *Id.* See 20 C.F.R. §§ 656.10, 656.22(c) (1991).

134. 8 C.F.R. § 204.5 (1992). The employer begins the labor certification process by submitting a U.S. Dept. of Labor Form ETA to the State Employment Service office. *Id.* The form requires information about the employer and the job she seeks to fill, and a statement of the alien's qualifications. *Id.* In the event of a surplus of labor, the DOL can still grant labor certifications, but only if the employer submits evidence of extensive recruiting efforts and has conformed with other certification requirements. IA90 § 122(a)(2)(B). Other certification requirements include elaborately detailed advertising; interviews of interested U.S. workers and rejections of these applicants for "lawful, job-related" reasons; and offers of prevailing wages with demonstrations that the employer is capable of paying these wages. *Id.*

135. 8 C.F.R. § 204.5 (1992); see Friedman, *supra* note 81, at 53.

only unnecessary, but senseless and unjust, imposing yet another obstacle for potential immigrants.¹³⁶

2. Notice Requirements

Under the IA90, the Secretary of Labor will only issue labor certifications if employers give notice of their applications to a bargaining agent or union representative in the occupational classification and area for which aliens are needed.¹³⁷ If no representative exists, the employer must give direct notice to current employees of the job opening by posting it on the premises,¹³⁸ a requirement that closely resembles previous DOL regulation requirements.¹³⁹

3. Documentary Evidence

In addition to the notice requirement, the new Act allows anyone to submit evidence relating to the certification, "thereby providing a forum of challenge to the certification by employees, unions, or other organizations."¹⁴⁰ The evidence may take any form, including documentary evidence about available workers, wages, or working conditions.¹⁴¹

C. Consequences of the Third Employment-Based Preference

Many argue that policy makers must consider U.S. priorities

136. Zengerle, *supra* note 131, at 256.

The idea that somebody who has a bachelor's degree is going to uproot himself from California and move to New York to pursue a job is unlikely. The idea that nationwide recruiting is going to answer the question as to whether there is an American worker ready, willing and available as a computer analyst is ridiculous. . . . The idea that an employer is going to spend a significant amount of money [in order to fulfill national pilot program requirements] to hire a foreigner when he indeed can't find an American anyway, is punishing him for being in business.

Id.

137. IA90 § 122(b)(1).

138. *Id.*

139. See 20 C.F.R. § 656.21(b)(3) (1990).

140. Leiden & Neal, *supra* note 102, at 331 (referring to IA90 § 122). "Some DOL regions already solicit information from rejected job applicants. By placing this provision in the statute, however, it appears that the Labor Department will now have to explicitly address such third party information in its final decisions on labor certification applications." YALE-LOEHR, *supra* note 94, § 3, at 9.

141. IA90 § 122(b)(2).

when making tough policy choices, and currently those best interests involve improving the economy and becoming more competitive in the global economic market.¹⁴² Policy makers evidently believed they could help accomplish this task by decreasing the number of unskilled immigrants allowed into the country.¹⁴³ Furthermore, the public, in general, believes that bringing in unskilled workers will worsen current economic conditions.¹⁴⁴ People fear the socializing costs in educating and training unskilled workers to function in our society because tax payers must bear these costs.¹⁴⁵ The view of most American citizens, and therefore of most politicians, is that “[n]ewcomers will have children, take up space, use public facilities, compete for jobs and housing, eventually vote, and seek to mold our society to their own purposes.”¹⁴⁶ Even though some unskilled workers enter the country to fill needed unskilled positions, many still argue that the tax payments they would contribute “simply don’t provide enough to make [increased unskilled immigration] self-liquidating.”¹⁴⁷ The IA90 reflects these concerns.¹⁴⁸

The argument that the United States appropriately reduced the number of unskilled immigrant visas to ensure that native American workers have jobs¹⁴⁹ has a certain paternalistic appeal. The problem remains, however, that even with better social conditions and encouragement in minority communities for its members to work, there will remain job shortages and therefore, jobs which immigrant workers can fill.¹⁵⁰ What the public and Congress seem to have overlooked is that large segments of unskilled and semi-

142. See S. REP. NO. 55, 101st Cong., 1st Sess. 6 (1989)(quoting Malcolm Lovell’s testimony before the subcommittee on Immigration and Refugee Affairs during the 100th Congress).

143. Many advocates of the IA90 argue that unskilled workers only burden the U.S. economy. See David Simcox, *Panel III: Labor Market Aspects of Legal Immigration Reform*, 4 GEO. L.J. 249, 273 (1990).

144. *Id.*

145. *Id.*

146. Schuck, *supra* note 43, at 4. *But see*, Frank, *supra* note 90, at 175-76 (questioning whether moral issues transcend or should transcend national borders).

147. Simcox, *supra* note 143, at 273.

148. Representative Ham Fish noted that the joint House-Senate conference committee suggested bringing in “scientists, engineers, computer experts, and other professionals.” 136 CONG. REC. H12,358 (daily ed. Oct. 27, 1990) (statement of Rep. Fish).

149. “You always hear people complain, ‘You’re bringing in these foreigners,’ but that’s not really what happens ‘They’re already here’ ‘They’re working, or they’re visitors, or students at universities who are getting trained.’” Baker, *supra* note 95, at 4 (quoting Carl Shusterman, former INS attorney).

150. See Frank, *supra* note 90, at 175.

skilled workers do not compete with U.S. workers for the following reasons:

- 1) They tend to fill jobs where chronic shortages of U.S. workers, such as household workers, exist;¹⁵¹
- 2) many are entrepreneurs who establish their own businesses and in fact create employment for U.S. workers;¹⁵²
- 3) they enter support networks of employment within their own ethnic community;¹⁵³ or
- 4) they perform work that U.S. labor is loathe to perform.¹⁵⁴

The notion that immigrants take jobs away from Americans rests mainly on the false assumption that the number of jobs is fixed, and therefore, if immigrants occupy jobs, fewer jobs will remain for natives.¹⁵⁵ In reality, "immigrants increase demand for labor across the range of occupations, because immigrants consume goods as well as produce them. They make jobs."¹⁵⁶ Immigrants do not significantly change the level of unemployment in particular industries.¹⁵⁷ Even in those industries where immigrants have typically concentrated, such as the restaurant and hotel businesses, natives do not tend to experience deleterious effects because often they do not want these jobs.¹⁵⁸ Some argue that the reason U.S. workers do not want to perform these jobs is because the availability of aliens to perform them depresses the wages and work conditions to unacceptable levels for U.S. workers.¹⁵⁹ However, in today's global economy, where capital moves freely, many of those jobs "are just as likely to go off-shore if the alien pool disappeared, rather than wages rising to levels that would make the employer non-competitive with overseas producers."¹⁶⁰

No definitive evidence supports the proposition that unskilled workers will hurt the U.S. economy or that they cannot improve it by filling many jobs where a demand for labor exists.¹⁶¹ Immi-

151. Fragomen, *supra* note 99, at 34.

152. *Id.*

153. *Id.*

154. *Id.*

155. Simon, *supra* note 90, at 4.

156. *Id.* at 5. See Sassen, *supra* note 38, at 22-23.

157. Simon, *supra* note 90, at 4.

158. *Id.*

159. See Fragomen, *supra* note 99, at 34.

160. *Id.*

161. Julian Simon finds that immigrants are young and just as well-educated as Americans. JULIAN SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 31-34, 38-40 (1989). George Borjas, on the other hand, finds that immigrants today are older and their education

grants typically arrive young and strong,¹⁶² and this enables them to make a maximum contribution to the social security, welfare, and tax systems throughout their working careers.¹⁶³ Congressman Barney Frank noted that:

[T]he act of immigration, the act of picking up and going to a foreign country where you may not speak the language very well, or you may not have any particular contacts, that's a pretty entrepreneurial thing to do.¹⁶⁴

Frank's comment suggests that immigrants by nature are very industrious people who want to improve their situations¹⁶⁵ and consequently, will contribute to the U.S. labor force. Furthermore, once immigrants reach retirement age, their children support them with social security and tax contributions.¹⁶⁶

The argument that the cost of social services expended on immigrants exceeds their share of taxes also fails. Reliable evidence produced from a 1983 study of aliens in Texas, a high-immigration state, shows that immigrant tax contributions adequately cover U.S. expenditures on services that the immigrants use.¹⁶⁷ Finally, Congresswoman Constance A. Morella emphasized that current shortages of child care, home care, elder care, and other types of care exist and that immigrants with less than two years training can help alleviate this problem.¹⁶⁸ American workers who react negatively to any increase in the number of immigrant visas generally do not recognize the underlying policies that cause many of

levels vary according to U.S. education levels. GEORGE BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY* 41-42 (1990). Nonetheless, the two authors agree that immigrants "do not reduce native wage and employment levels . . . [and] do not significantly burden the public coffers . . ." Schuck, *supra* note 43, at 14.

162. See Simon, *supra* note 90, at 16. *But see* BORJAS, *supra* note 161.

163. See generally Simon, *supra* note 90, at 16.

164. Frank, *supra* note 90, at 171.

165. Schuck notes that people emigrate when better opportunities exist in other countries: "[N]o single immigrant selection criterion compels anyone to migrate; workers will migrate only if the receiving country's 'offer' - its economic opportunity - is better than alternative offers." Schuck, *supra* note 43, at 15.

166. See generally Simon, *supra* note 90, at 3.

167. Simon, *supra* note 90, at 4, 18 n.4 (citing Sidney Weintraub & Gilbert Cardenas, *Use of Public Services by Undocumented Aliens in Texas: A Study of State Costs and Revenues* (Austin: The Lyndon B. Johnson School of Public Affairs, University of Texas, 1983)).

168. See 67 INTERPRETER RELEASES 1473 (Dec. 21, 1990). Congresswoman Morella tried in vain to focus Congress's attention on the anticipated 19,000 or more visas per year needed for these types of workers and their families. *Id.* See *infra* notes 234-35 and accompanying text.

their problems.¹⁶⁹ They fear those policies “emphasizing equality, public goods and service delivery, or power over economic life”¹⁷⁰ and tend to embrace conservative policies. They ignore what has emerged as the capitalist reality — necessities of competition.¹⁷¹ These necessities demand that capital abandon immobile labor in search of profits based on low-wage labor competition.¹⁷² As capital flees organized, high-wage labor areas, and seeks stagnant labor pools, the global consumer market will eventually shrink,¹⁷³ and the global economy will approach instability and depression.¹⁷⁴ Thus, what angry American workers should focus on is not the number of immigrants entering the country, but rather, the problems inherent in a system of total capital mobility.¹⁷⁵

Furthermore, anti-immigrant segments concerned with the movement of unskilled workers into the country need to ask themselves on what level they would like the United States to compete. Should we focus on the future of the U.S. work force in low-skilled, low-wage jobs, or should we compete on high-wage technological levels?¹⁷⁶ Some see the decline of U.S. competitiveness as a result of low and unskilled worker immigration.¹⁷⁷ They argue that this

169. Corporate decision makers are not blamed for the loss of jobs, and a “popular ideology emerges [among workers] which precludes a radical politics aimed at the root causes of the problem.” Peet, *supra* note 15, at 38.

170. Ross, *supra* note 18, at 265.

171. Peet, *supra* note 20, at 13. This result, however, “occurs not through a consciously reached social agreement to improve the standard of living in the interest of all but through coercion by competitive social relations.” *Id.*

172. Low wage labor competition “forces capitalist producers to use a minimum of resources to reach the highest level of output. Competition also entails the achievement of scale in production to earn lower costs (use less resources), and to control, and if possible monopolize, an area of production.” *Id.* at 13.

173. “Escaping from one (labor) problem at one (national) scale capitalism enters a new (under-consumption) crisis at a wider (global) scale.” Peet, *supra* note 20, at 30. The consumer market will shrink as a result of an “expansion of very high-income professional and technical jobs, a shrinking of middle income blue - and white-collar jobs and vast expansion of low-wage jobs.” SASSEN, *supra* note 38, at 22.

174. Peet, *supra* note 20, at 11.

175. Richard Peet notes:

There is a need for policy solutions which go beyond amelioration to the heart of the matter, even if this means fundamentally changing social structures, substituting planning for the market, and using social rather than private decision making to control industrial change.

Richard Peet, *Part I: Introduction, in INTERNATIONAL CAPITALISM AND INDUSTRIAL RESTRUCTURING* 1, 3 (Richard Peet ed., 1987).

176. Baer, *supra* note 23, at 144.

177. “Many other factors explain the decline of U.S. competitiveness, but the low-skill immigration of recent decades has surely not been helpful” Laurence E. Harrison, *Is Immigration Policy a Factor in Our Economic Woes?*, MIAMI HERALD, Feb. 2, 1992, at C6.

economic trend will only change if immigration laws allow more skilled workers and fewer unskilled workers to immigrate.¹⁷⁸ By increasing the number of skilled immigrant visas, however, Congress and policymakers implicitly admit that there are not enough skilled workers in this country. Yet, these policy makers fail to address the fundamental underlying problems: inadequate training and education of workers in the United States.¹⁷⁹ Instead of focusing on attracting foreign skilled workers, would Congress not have used its time more wisely developing an education system more in tune with U.S. economic needs?

Certain consequences will result from the legislation enacted pursuant to the Congressional goal of increasing skilled labor immigration and improving the economy.¹⁸⁰ The unskilled worker trying to immigrate legally to the United States will feel the most obvious impact.¹⁸¹ Furthermore, selectively restrictive U.S. immigration policies help maintain a stagnant labor pool in developing countries, creating opportunities for exploitation by multinational corporations engaged in direct foreign investment.¹⁸² These immobile labor pools create incentives for American corporations to transfer manufacturing and production facilities to developing countries.¹⁸³

178. MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* (1990). In his book, Porter, an economist, focuses on how skilled immigrants contribute to a high standard of living.

179. See generally ROBERT HEILBRONER, *Investing in America's Future*, Economic Policy Institute (C-SPAN), at 15, 16-20 (Oct. 21, 1991).

180. See discussion *supra* part III.B.

181. See generally Aragones, *supra* note 11, at 110.

182. See generally Bluestone & Harrison, *supra* note 21.

183. Peet, *supra* note 19, at 59. Peet argues:

The accumulation of millions of unemployed or underemployed people in the Third World cities, backed by large pools of would be migrants in rural areas, provides an unending stream of cheap labor for transnational industry, a condition which renders worker unionization extremely difficult.

Indeed, there is so much cheap labor available on the world market that transnational enterprise has been able to pick and choose between alternative regions

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V. DOCTRINAL ANALYSIS OF THE IA90'S FIFTH EMPLOYMENT-BASED PREFERENCE AND DISCUSSION OF ITS CONSEQUENCES

A. *Fifth Employment-Based Preference — The New Investor Immigrant Visas*

To fully comprehend the significance of the restriction of labor mobility fostered by the third employment-based preference, it is important to view it in light of the newly-created¹⁸⁴ fifth employment-based preference¹⁸⁵ which facilitates capital mobility. This new category deals with investors and relates to Congress's goal of improving the U.S. economy by infusing capital and creating more jobs for U.S. workers.¹⁸⁶ The Act allows up to 10,000 aliens¹⁸⁷ per year to invest between \$500,000 and \$3 million, depending upon location, in an enterprise which will benefit the United States.¹⁸⁸

184. "Prior to [the IA90] a foreign investor who wished to immigrate to the United States . . . to establish or acquire a business was, for all practical purposes, precluded from achieving this objective." Clement, *supra* note 76, at 195. See IMMIGRATION: PROCESS AND POLICY, *supra* note 124, at 210-11. Although potential immigrants were not excluded because they wished to invest, there was no specific entry category for permanent residence based on investments. See *id.*

185. IA90 § 121(a) (adding INA § 203(b)(5), 8 U.S.C. § 1153(b)(5)):

Employment Creation. -

(A) In General. - Visas shall be made available, in a number not to exceed 10,000, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise -

(i) which the alien has established,

(ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

Id.

186. 136 CONG. REC. S17,112 (daily ed. Oct. 26, 1990) (statement of Sen. Simon). "This 'employment creation' category was a Congressional reaction to similar programs in Canada and Australia that had been successful in attracting foreign capital." Groban, *supra* note 72, at 362. See Arsenio Aloroso, Jr., *New Ticket for Green Card is Money*, CRAIN'S CHI. BUS., Sept. 30, 1991, at 1. Canada, however, requires a \$350,000 investment in either Ontario, British Columbia, or Quebec to qualify. *Uncle Sam Welcomes Yacht People*, TORONTO STAR, Sept. 29, 1991, at H3 [hereinafter *Yacht People*]. The \$1 million requirement of the IA90 has resulted in the U.S. being coined "the Rolls Royce of jurisdictions." *Id.*

187. IA90 § 121(a)(A) (adding INA § 203(b)(5), 8 U.S.C. § 1153(b)(5)). As with unskilled workers, there is no spillover provision for investor immigrant visas. See *id.*

188. IA90 § 121(a)(C)(i) (adding INA § 203(b)(5)(A), 8 U.S.C. § 1153(b)(5)(A)). The Attorney General, together with the Secretary of Labor and the Secretary of State, may

The investor category requires the creation of a "new" and "commercial" enterprise.¹⁸⁹ The final regulations have not interpreted "new" solely to mean the creation of a previously non-existing business. Instead, investors may purchase and restructure or expand an old business.¹⁹⁰ The Federal Regulations define "commercial" as "any for-profit activity formed for the ongoing conduct of lawful business"¹⁹¹ The Act states that the enterprise must "create" ten full-time jobs for U.S. citizens or employment-authorized immigrants (excluding the investor and her immediate family).¹⁹² The final regulations interpret "create" to include maintaining ten existing employees, as well as putting ten new employees to work.¹⁹³ Neither the Act nor the Regulations specify any restrictions on the types of businesses alien investors may create.¹⁹⁴

The IA90 reserves 3,000 investor visas for development in special "target areas."¹⁹⁵ The required investment amount in these areas is lowered to \$500,000.¹⁹⁶ In areas of low unemployment, however, the INS may, by regulation, increase the amount and require up to a \$3 million investment.¹⁹⁷ The aliens must complete their investments within a "reasonable" time.¹⁹⁸

specify investment amounts as they feel necessary. 56 Fed. Reg. 60,897 (1991) (to be codified at 8 C.F.R. §§ 103, 204).

189. IA90 § 121(a) (adding INA § 203(b)(5), 8 U.S.C. § 1153(b)). See SKLAR, *supra* note 5, § 3, at 14.

190. 8 C.F.R. § 204.6 (1992).

191. *Id.*

192. IA90 § 121(a) (adding INA § 203(b)(5)(A)(iii), 8 U.S.C. § 1153(b)(5)(A)(iii)).

193. 8 C.F.R. § 204.6 (1992).

194. According to Sen. Paul Simon, Congress "do[es] not want or need excessive or arbitrary industrial policy tests about what constitutes a worthwhile investment." 136 CONG. REC. S17,112 (daily ed. Oct. 26, 1990) (statement of Sen. Simon). This lack of concern over where to invest money can lead to the establishment of minimally beneficial businesses. One example involves Wu Wen-Shuo, a Taiwanese medical student finishing school at UCLA, who is investing \$1.1 million into a gas station/car wash in California. Richard Lacayo, *Give Me Your Rich, Your Lucky . . . ; In the Most Sweeping Policy Revision In 25 Years, the U.S. Will Welcome Increasing Numbers of Europeans and Well-Heeled Foreigners*, TIME, Oct. 14, 1991, at 26. Another example is how the former INS commissioner for the Western Region, Harold W. Ezell, tried to induce investors by offering hot-dog franchises as possible investment opportunities. Ashley Dunn, *Lure of Visas Fails to Attract Rich Investors; Immigration: Program Draws a Fraction of the Expected Applicants. Requirement of \$1 - Million Investment is Cut in Half for Many Areas of Country*, L.A. TIMES, Dec. 24, 1991, at A3.

195. IA90 § 121(a)(B) (adding INA § 203(b)(5)(B), 8 U.S.C. § 1153(b)(5)(B)).

196. 8 C.F.R. § 204.6 (1992).

197. IA90 § 121(a) (adding INA § 203(b)(5)(C)(iii), 8 U.S.C. § 1153(b)(5)(C)(iii)).

198. Six months is probably a reasonable time. S. REP. No. 55, 101st Cong., 1st Sess. 21 (1989).

The fifth preference category created much controversy before Congress finally adopted it.¹⁹⁹ The congressional debates showed a clear anticipation of fraudulent investments.²⁰⁰ In an effort to deter fraud, the IA90 provides for the issuance of investor visas on a two-year conditional basis.²⁰¹ Within the ninety days preceding the end of the second year, the investor has to petition to have the conditional status removed.²⁰² The petition must state that the alien established a commercial enterprise, invested or was in the process of investing the requisite capital, and sustained the previous two actions throughout the period of her residence in the United States.²⁰³

At the end of two years, the Attorney General decides whether the alien has conformed with the investor category guidelines in establishing the commercial enterprise.²⁰⁴ If the investor satisfies the guidelines, she loses her conditional status,²⁰⁵ receives a green card,²⁰⁶ and may qualify for citizenship in three years.²⁰⁷ If an investor knowingly establishes a commercial enterprise merely to evade the immigration laws, she can be fined and imprisoned for up to five years.²⁰⁸

Once the two year conditional residence period ends, the IA90 no longer imposes any obligations on the investor. The investor could choose to shut down the business, thus displacing those workers whom she employed for two years. Because the period of conditional residence counts towards the five year period of lawful residence required for naturalization, the alien will not have to

199. IMMIGRATION: PROCESS AND POLICY, *supra* note 124, at 211. See 67 INTERPRETER RELEASES 1211 (Oct. 29, 1990); see generally Mark Gibney, *United States Immigration Policy and the 'Huddled Masses' Myth*, 3 GEO. IMMIGR. L.J. 361, 376-77 (1989).

200. See SKLAR, *supra* note 5, § 3, at 14. Expressing concern over fraudulent investments, Senator Bumpers sought elimination of the provision. Clement, *supra* note 76, at 207.

201. IA90 § 121(b) (adding INA § 216A(a), 8 U.S.C. § 1186A(a)).

202. IA90 § 121(b) (adding INA §§ 216A(c)(1)(A), (c)(2)(A), 8 U.S.C. § 1186A(c)(1)(A), (c)(2)(A)).

203. IA90 § 121(b) (adding INA §§ 216A(c)(1)(A), (d)(1)(A), d(1)(B), d(1)(C), 8 U.S.C. § 1186A(c)(1)(A), (d)(1)(A)).

204. IA90 § 121(b) (adding INA § 216A(b), 8 U.S.C. § 1186A(b)).

205. IA90 § 121(b) (adding INA § 216A(c)(3)(B), 8 U.S.C. § 1186A(c)(3)(B)).

206. *Id.* See *Yacht People*, *supra* note 186, at H3.

207. IA90 § 121(b) (adding INA § 216A(c)(3)(B), 8 U.S.C. § 1186A(c)(3)(B)).

208. IA90 § 121(b) (adding INA § 216A(f)(3), 8 U.S.C. § 1186A(f)(3)). Note, it is possible that investors will abuse this category by waiting out the two year conditional residence period. Even if their true intent is to evade immigration laws, they will avoid the penalties if they simply follow the specified guidelines for two years.

turn back the clock and begin the naturalization process again at the end of the two years.²⁰⁹ However, if the INS terminates an investor's conditional status, it can have the investor deported.²¹⁰ Because this category is new, it will likely generate more litigation than any of the other employment-based provisions.²¹¹

B. Consequences of the Fifth Employment-Based Preference

Some have criticized the new visa program as smacking of elitism and discrimination, "sending a blatant message that the rich don't have to wait their turn or play by the same rules as traditional immigrants."²¹² They argue that the IA90 ignores the Statue of Liberty's call, "Give me your tired, your poor, your huddled masses"²¹³ Instead, they argue the United States wants only "your skilled, your rich and your lucky,"²¹⁴ and "those who can pay cash."²¹⁵ The main difference between the new fifth preference *immigrant* category and the treaty trade and treaty investor *nonimmigrant* categories²¹⁶ is that now "individuals with money will not only be able to invest and work in the United States, but, in effect, will be able to purchase their permanent residence for approxi-

209. See SKLAR, *supra* note 5, § 3, at 11. After five years, the investor and her family are eligible for full citizenship. Al Kamen, *An Investment in American Citizenship; Immigration Program Invites Millionaires to Buy Their Way In*, WASH. POST, Sept. 29, 1991, at A1.

210. IA90 § 601(a) (amending INA § 241(a)(1)(D), 8 U.S.C. § 1251(a)(1)(D)(i)).

211. See Aragones, *supra* note 11, at 126.

212. *Yacht People*, *supra* note 186, at H3. Senator Bumpers argued that the provision "is odious, it is offensive, it flies right in the face of the national character of this country." 129 CONG. REC. S6,738 (daily ed. May 16, 1983) (statement of Sen. Bumpers).

213. See generally Gibney, *supra* note 199; see also *Yacht People*, *supra* note 186, at H3.

214. Lacayo, *supra* note 194, at 26.

215. Kamen, *supra* note 209, at A1.

216. INA § 101(15)(E), 8 U.S.C. § 1101(15)(E) (1988). Section 101(15)(E) provides:

An alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . ; (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which . . . he is actively in the process of investing a substantial amount of capital.

Id. These E-1 treaty trade and E-2 treaty investor categories pertain to nonimmigrant visas. *Id.* Thus, they do not allow a foreign investor wishing to establish an enterprise in the United States to remain permanently in the United States.

mately \$1 million."²¹⁷

This attempt to attract wealthy foreigners threatens some cherished notions about fairness, implying that "if you're poor and uneducated, America doesn't want you."²¹⁸ Thus, even though the IA90 increases the total pool of immigrants, the expansion favors the skilled and the wealthy, but almost completely ignores the unskilled and the poor. To look at the IA90 solely in terms of numbers ignores its elitist interests and discriminatory nature.

VI. WHY IMMIGRATION LAW SHOULD INCREASE LABOR MOBILITY

This Comment does not argue that the United States should restrict entry of skilled workers or investors. In today's highly competitive world, large businesses need access to the best available managers and specialists.²¹⁹ Nonetheless, while U.S. corporations require skilled labor and high-level managers to establish and maintain a technological edge,²²⁰ they also need unskilled laborers from other nations in order to "thrive in economic periods of rapid development and free competition for resources."²²¹ The dramatic increase in the overall number of immigration visas under the IA90 would seemingly have included at least a nominal increase in the number of visas issued to unskilled workers. Instead, the Act actually reduced that number.

217. Aragonés, *supra* note 11, at 126. Congressman Barney Frank argued:

I particularly dislike the notion of an economic buy-in to immigration. I'm willing to accept investment from people who will invest because they think it makes sense for them to invest. But allowing people to buy their way into American citizenship doesn't strike me as very attractive morally.

Frank, *supra* note 90, at 171. See IMMIGRATION: PROCESS & POLICY, *supra* note 124, at 211.

218. Lacayo, *supra* note 194, at 26. Harold Ezell, former immigration service official and now immigration consultant, said: "We've done a great job on boat people; a few yacht people wouldn't hurt." *Yacht People*, *supra* note 186, at H3.

219. Fragomen, *supra* note 99, at 29. There are "documented and growing labor shortages in this country." *Id.* For example, the United States currently has a shortage of highly qualified scientific personnel. See *supra* notes 177-79 and accompanying text. While this Comment has not focused on the failure of the United States to invest in education, this is certainly a factor which has contributed to the problems U.S. industries now face. *Id.*

220. See Fragomen, *supra* note 99, at 30. Fragomen notes:

The ability to put the best manager or the most expert technician in the right position within the company at the precise moment that he or she is needed is an absolute requirement to assure that a business stays even with, or ahead of well-financed and highly efficient overseas competitors.

Id. at 31.

221. Laird M. Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 *How. L.J.* 497, 502 (1988).

In the future, the United States will likely require higher levels of immigration than currently provided.²²² Analysts predict a continuing slow-down in U.S. population growth over the next fifty years, leading eventually to a decline in overall population.²²³ Without a more expansive immigration policy, the United States may fall prey to the same type of economic growth constrictions which have plagued the East Asian nations of Malaysia, Taiwan, South Korea, Hong Kong, and Singapore.²²⁴ In these high-growth nations, economic expansionism has stripped the supply of unskilled and semi-skilled workers, and the more highly-educated citizens shun laboring and menial or repetitive jobs.²²⁵ The serious labor shortages have forced these countries to ease entry restraints to attract more workers, thereby dissuading big foreign corporations doing business there from decreasing investments or relocating elsewhere.²²⁶

The United States and other countries "can no longer ignore the fact that the free flow and mobility of labor from within one country, or from one nation to another, has increasingly become an integral part of international commerce."²²⁷ As open markets ease immigration pressures by decreasing wage differentials and creating jobs, the prospect of international labor mobility becomes more realistic.²²⁸ Agreements such as NAFTA may foster integration. By increasing Mexico's employment and incomes, NAFTA takes a step toward the possible free flow of workers.²²⁹ With the integration of markets, reciprocal arrangements can provide for the move-

222. Fragomen, *supra* note 99, at 30.

223. *Id.*

224. See Richardson, *supra* note 62.

225. *Id.*

226. *Id.*

227. Street, *supra* note 221, at 502.

228. See Reid & Hunter, *supra* note 38, at 175-76.

229. Reid and Hunter argue:

[With integrated economies there exists] an opportunity for removing some of the social and economic obstacles to international labor mobility and hence to improve the efficiency of labor-resource allocation. Full integration may be briefly defined as the operation by several countries of common policies which permit goods and productive factors originating in one of those countries to move across the frontiers of constituent countries as freely as they could within the country of origin itself. A common labor market policy will be an important item in full integration, and it requires two main conditions. Labor from any member country will be able to move freely within the union to accept offers of employment actually made. And immigrant labor from a member country will not be subject to discrimination in terms of employment conditions.

ment and settlement of labor.²³⁰ Ideally, labor mobility should not be restricted because it assists both capitalists and workers. It creates a broader arena in which to find workers and allows countries access to the best management and scientific talent.²³¹ Furthermore, nations benefit socially and economically from the diversity of immigrants moving to their countries.²³²

VII. CONCLUSION

The IA90's third employment-based preference secures U.S. borders against unskilled workers, while the fifth employment-based preference opens the borders to those with capital. In combination, these provisions highlight an overall trend in the U.S., wherein the free movement of goods, technology, and capital is valued over the free movement of people.²³³

In order to have long-term economic growth, immigration policies must help meet the needs of American workers. Currently, the United States has desperate shortages of home care, elder care, and day care providers that will only increase.²³⁴ Unskilled workers can fill these positions and thus help meet the American workers' needs. Ten thousand visas, however, "are inadequate to meet the United States' future demands. In fact, these numbers are insufficient to meet even today's demands."²³⁵ The IA90 amends immigration law to take the "best" of all societies and exclude most workers who do not meet the selective criteria. Rather than molding our education system to meet the needs of U.S. corporations — for example, by subsidizing companies to train laborers in various skills — Congress has chosen to immigrate better-skilled, better-educated foreigners.

The issues generated in the debates over the IA90 reflect a growing concern that the United States is helping the aliens who need the least assistance, while making it even more difficult for workers from countries experiencing grave unemployment, as well as human rights difficulties, to enter the country.²³⁶ Many attempt

230. *Id.* at 195.

231. See Fragomen, *supra* note 99, at 29.

232. See Simon, *supra* note 90, at 18.

233. See generally Schuck, *supra* note 43, at 1.

234. See Aragones, *supra* note 11, at 126.

235. *Id.*

236. See Gibney, *supra* note 199, at 370-71. On the issue of human rights Gibney notes: [T]he overwhelming majority of refugees who are admitted to the United States

to justify a reduction in unskilled workers by saying that it saves American jobs. However, this view directly contradicts the necessary effects of a North American free trade agreement, for example, which practically ensures the eventual loss of American jobs. Currently, free trade agreements that ignore labor, such as NAFTA, and the rapid infusion of capital into developing countries, enhance the mobility of capital and give capitalists a *carte blanche* to exploit the workers in those countries. This means that American businesses will set up in developing countries where they can extract the most work for the least cost. The IA90's protectionist policies ensure a captive, stagnant labor pool for capitalists. As a result, American workers will begin concession bargaining and accepting lower wages and benefits merely to retain their jobs. The standard of living will decline, as will the overall consumption rate. Over the long-term this will hurt the capitalists who moved offshore because fewer people will purchase their products. Furthermore, a decreased standard of living means more people will eventually depend on welfare and public assistance programs.

The popular image of the United States has often been one of a country with an altruistic open door policy of immigration.²³⁷ The IA90, however, highlights that, "[u]nder the guise of providing a home for the huddled masses of the world, U.S. alien admissions has, at times, been anything but"²³⁸ While immigration plays an important role in national economic and labor policies,²³⁹ the IA90 creates an obstacle for labor mobility, and this will result in detrimental consequences for the United States. When viewed together with NAFTA, the IA90 highlights the global trend toward an increased disparity between capital and labor empowerment. Without labor mobility, labor loses part of its human qualities, and capitalist inequality takes the form of class differences.²⁴⁰ Such

each year are from countries where human rights conditions are only moderately poor. Individuals fleeing from countries where there are gross human rights violations *and* where persecution comes in its most pernicious forms either find a safe haven in other countries, or they do not find it at all.

Id. at 371.

237. *Id.*

238. *Id.* at 365. "The new concept is, 'What is in it for the United States?' . . . This is a matter of concern that [immigration policy] may signal a turning away from more traditional humanitarian bases." Seth Mydans, *Foreign Millionaires in No Rush to Apply for Visas*, *U.S. Finds*, *N.Y. TIMES*, Dec. 22, 1991, § 1, at 18.

239. "[I]mmigration is reshaping America's character and future - her economy, workforce, family structures, demography, culture, cuisines, languages, and politics." Schuck, *supra* note 43, at 1.

240. See BRYAN S. TURNER, *CITIZENSHIP AND CAPITALISM: THE DEBATE OVER REFORMISM*

growing inequalities in positions, prestige, and political power threaten world peace.²⁴¹ Without more attention to the facilitation of labor mobility, regional economic integration will not produce global stability, but rather global instability.

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113 (1986).

241. EDWARDS & GARONNA, *supra* note 12, at 7.

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